

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 14, 2017**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2016AP90-CR**

**Cir. Ct. No. 2014CF351**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**BRENT A. MOEN,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Polk County: MOLLY E. GALEWYRICK, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Brent Moen filed a notice of appeal purporting to appeal an April 6, 2015 judgment convicting him of retail theft and a January 4, 2016 order denying his postconviction motion. In the postconviction motion, Moen sought withdrawal of his guilty plea or, alternatively, resentencing. The circuit court denied the motion without a hearing. Because the challenge to the

guilty plea was not properly before the court and the motion did not establish grounds for resentencing, we affirm the judgment and order.

¶2 Moen was charged with possession of methamphetamine and attempted felony retail theft as a party to a crime. Pursuant to a plea agreement, the State dropped the methamphetamine charge and Moen entered a guilty plea to the theft charge. On March 20, 2015, the court withheld sentence and placed Moen on probation. Moen did not file a notice of intent to pursue postconviction relief from that judgment, and executed a form stating: “I do not plan to seek postconviction relief.”

¶3 On June 16, 2015, the Department of Corrections issued a revocation order and warrant alleging Moen failed to report to his probation agent, failed to provide a urinalysis, used methamphetamine, used a credit card without the owner’s permission, and committed a battery. Moen’s probation was revoked and he was returned to the circuit court for sentencing. The court imposed the maximum sentence of one and one-half years’ initial confinement and two years’ extended supervision. Moen filed a timely notice of intent to pursue postconviction relief from that judgment, and this court granted his motion to extend the time to file a postconviction motion or notice of appeal “from the sentence imposed after revocation.” This court did not extend the time for Moen to file a postconviction motion from the initial judgment imposing probation.

¶4 Nonetheless, Moen filed “Defendant’s Postconviction Motion Pursuant To WIS. STAT. § 809.30” (2015-16),<sup>1</sup> requesting plea withdrawal on the

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

ground that he was not informed that the State would be required to prove he knew the merchandise he stole was held for resale by Walmart. The motion also sought resentencing, arguing the sentence exceeded the “minimal amount of custody or confinement which is consistent with the protection of the public, gravity of the offense and the rehabilitative needs of the defendant,” and was harsh or unconscionable. The circuit court denied the motion without a hearing by order entered January 4, 2016.

¶5 Moen’s motion to withdraw his guilty plea relates to the initial judgment of conviction. Therefore, it was not the proper subject of the present postconviction motion and appeal. A challenge to a postrevocation sentence does not bring the original judgment of conviction before the court. *State v. Scaccio*, 2000 WI App 265, ¶10, 240 Wis. 2d 95, 622 N.W.2d 449. Because Moen did not timely commence postconviction proceedings from the initial judgment of conviction, appellate review is limited to the sentence imposed after revocation. *See State v. Tobey*, 200 Wis. 2d 781, 782-83, 548 N.W.2d 95 (Ct. App. 1996); *State v. Drake*, 184 Wis. 2d 396, 399, 515 N.W.2d 923 (Ct. App. 1994). Therefore, the circuit court properly rejected Moen’s challenge to the guilty plea, and this court will not review the merits of that issue.

¶6 Moen asks in his reply brief that this court construe his motion as a motion under WIS. STAT. § 974.06, which has no time limit. We reject that request. Arguments cannot be made for the first time in a reply brief, depriving the State of an opportunity to respond. *Richman v. Security Savings & Loan Ass’n*, 57 Wis. 2d 358, 361, 204 N.W.2d 511 (1973). The issue also cannot be raised for the first time on appeal. *State v. Van Camp*, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997). Moen did not ask the circuit court to construe the motion in that manner. Rather, the motion explicitly invoked WIS. STAT. RULE 809.30. The

motion did not explicitly identify any constitutional or jurisdictional issue, and the part of the motion challenging the sentence would not have been cognizable under WIS. STAT. § 974.06. *Smith v. State*, 85 Wis. 2d 650, 661, 271 N.W.2d 20 (1978). On appeal, Moen does not develop any argument regarding the applicable standards for a motion under § 974.06. Therefore, we will not construe the portion of the motion challenging the guilty plea as a motion under § 974.06.

¶7 Moen’s argument that the sentence was excessive was properly brought under WIS. STAT. RULE 809.30, but the motion does not establish a lack of a reasonable or justifiable basis for the sentence. *See State v. Lechner*, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998). Sentencing is left to the broad discretion of the circuit court, and review is limited to whether the court erroneously exercised its discretion. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. Moen contends the circuit court “failed to consider the relatively low amount (\$1000) of the merchandise” or that “Moen paid restitution for the only object that was obviously missing; the speaker.” The sentencing court was not required to consider this a minor theft. In addition, the court appropriately considered Moen’s character, including multiple convictions and revocations of probation, the short time he was on probation in this case before he violated the terms of his probation, and the numerous violations.

¶8 The court also appropriately considered the public interest. Moen contends the court impermissibly focused on “the importance of the victim,” Walmart. Moen misconstrues the sentencing court’s statement. The court commented that stealing results in Walmart raising its prices and harming “individuals of modest means, hard-working individuals who go to work every day for \$8.50 an hour and need to get the best deal possible on food, clothing and other necessary items.” These comments do not suggest the court imposed a harsh

sentence because it considered the importance of Walmart. Rather, it expressed concern for the public as a whole because the costs of Walmart's losses due to theft are passed on to the general public.

¶9 In light of the circuit court's finding that Moen failed to make a good faith effort to comply with the terms of his probation, his high risk to reoffend based on his drug addiction, and his substantial prior record, the sentence is not so excessive as to shock public sentiment. *See Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

